

**Guinnip v Maresca**

2022 NY Slip Op 31346(U)

April 14, 2022

Supreme Court, Kings County

Docket Number: Index No. 514893/2017

Judge: Genine D. Edwards

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This opinion is uncorrected and not selected for official publication.

At an I.A.S. Trial Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 14th day of April 2022

P R E S E N T :

Hon. Genine D. Edwards, Justice

MORGAN GUINNIP, as Administrator of the Estate of PETER GUINNIP, Deceased,

Index No.: 514893/2017

Plaintiff,

v.

G. MICHAEL MARESCA, M.D., ALAN SHERBURNEE, M.D., DAVID OKOLICA, M.D., AND AUBURN COMMUNITY HOSPITAL,

Defendants.

AUBURN COMMUNITY HOSPITAL,

Third-Party Plaintiff,

v.

G. MICHAEL MARESCA, M.D., AUBURN RADIOLOGY, P.C. and PROFESSIONAL PRACTICE MANAGEMENT, PC a/k/a PROFESSIONAL PRACTICE MANAGEMENT, INC.,

Third-Party Defendants.

The following e-filed papers read herein:

Notice of Motion, Affirmations (Affidavits) and Exhibits Annexed  
Affirmations in Opposition and Exhibits Annexed  
Reply Affirmations (Affidavits) and Exhibits Annexed  
Stipulations – Adjournment of Motion

NYSCEF Doc No.:

146-169; 172-184  
196-218  
219-220; 222-225  
170; 195

In this action, plaintiff seeks to recover damages for medical malpractice and lack of informed consent.

Defendants David Okolica, M.D., Alan Sherburne, M.D., and Auburn Community Hospital separately filed summary judgment motions. Plaintiff argued that the motions from defendants Alan Sherburne, M.D. and Auburn Community Hospital were untimely. Wherewith, defendants Alan Sherburne, M.D. and Auburn Community Hospital claimed they timely filed their motions because the parties executed a stipulation to adjourn defendant David Okolica, M.D.'s motion for summary judgment<sup>1</sup>; thus, they had a good faith reason to believe their motions made returnable on the same date would be considered timely.

Leave to file a late motion for summary judgment under CPLR 3212(a) requires a showing of a satisfactory explanation for the delay in filing the motion. *See Brill v. City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261 (2004). "Absent a 'satisfactory explanation for the untimeliness,' constituting good cause for the delay, an untimely summary judgment motion must be denied without consideration of the merits." *Dojce v. 1302 Realty Co., LLC*, 199 A.D.3d 647, 157 N.Y.S.3d 478 (2d Dept. 2021) quoting *Brill*, 2 N.Y.3d 648.

Defendants Alan Sherburne, M.D. and Auburn Community Hospital did not make the required showing. Under the Kings County Supreme Court Uniform Civil Term Rules, motions for summary judgment may be made no later than sixty (60) days after filing a Note of Issue and may only be extended by the Court upon good cause shown. *Kings County Supreme Court Uniform Civil Term Rules, Part C, Motions in IAS Parts*. This Court does not accept stipulations to extend the time to move for summary judgment. Regardless, the stipulation in question only adjourned defendant David Okolica, M.D.'s motion for summary judgment and was silent on defendants Alan Sherburne, M.D. and Auburn Community Hospital filing summary judgment motions.

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<sup>1</sup> In addition, defendant Auburn Community Hospital indicated it was not served with the motion for summary judgment by Dr. Sherburne upon which it was going to rely, within the 60-day period of the Kings County Supreme Court Uniform Civil Term Rules.

With respect to the summary judgment motion from David Okolica, MD, a defendant who moves for summary judgment dismissing a complaint alleging medical malpractice must establish, prima facie, either that there was no departure from accepted standards of medical care or that any departure was not a proximate cause of plaintiff's injuries. *Schwartzberg v. Huntington Hospital*, 163 A.D.3d 736, 81 N.Y.S.3d 118 (2d Dept. 2018); *McAlwee v. Westchester Health Associates, PLLC*, 163 A.D.3d 549, 80 N.Y.S.3d 401 (2d Dept. 2018). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985).

Viewing the evidence in the light most favorable to the nonmoving plaintiff, David Okolica, M.D. failed to meet his prima facie burden. He proffered an affidavit, as his own expert, and rendered an opinion that was speculative and unsupported by the record. Moreover, he admitted he had a limited view of the lower sigmoid colon during the laparoscopic appendectomy procedure and acknowledged that the pathology report did not indicate an observable perforation in the appendix, along with the fact that decedent's hospital course was not typical for a routine appendectomy.

Lack of informed consent is a form of medical malpractice. To establish a cause of action to recover damages for malpractice based upon lack of informed consent, a plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the actual procedure performed for which there was no informed consent was the proximate cause of the injury. *See Palagye v. Loulmet*, \_\_\_ N.Y.S.3d \_\_\_, 2022 N.Y. Slip Op. 01302 (2d Dept. 2022). David Okolica, M.D. established entitlement to judgment as a matter of law dismissing the lack of informed consent cause of action. In opposition, plaintiff failed to raise a triable issue of fact.

Accordingly, it is

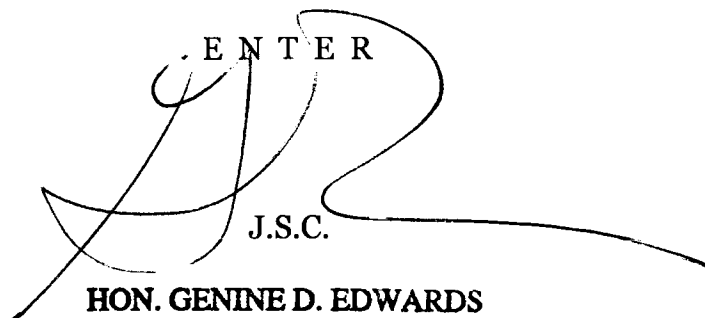
**ORDERED** that the motions for summary judgment by Alan Sherburne, M.D., and Auburn Community Hospital are denied; and it is further

**ORDERED** that David Okolica, M.D.'s summary judgment motion is granted only as to informed consent.

This constitutes the Decision and Order of this Court.

For Clerks use only

MG \_\_\_\_  
MD \_\_\_\_  
Motion Seq.#: 3-5

ENTER  
  
J.S.C.  
**HON. GENINE D. EDWARDS**